R.D. # 01-10
Clifton, NJ

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 22

XPEDX, A DIVISION OF INTERNATIONAL PAPER[1]

Employer/Petitioner

and **CASE 22-UC-339**

LOCAL 560, INTERNATIONAL BROTERHOOD OF TEAMSTERS[2]

Union/Petitioner

and **CASE 22-RC-13066**

LOCAL 641, INTERNATIONAL BROTERHOOD OF TEAMSTERS[3]

Intervenor

REGIONAL DIRECTOR'S DECISION AND ORDER GRANTING UNIT CLARIFICATION

I. INTRODUCTION

Upon petitions duly filed under Section 9(c) of the National Labor Relations Act, as amended, herein referred to as the Act, a hearing was held before a hearing officer of the National Labor Relations Board, herein referred to as the Board.

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[1] The name of the Employer/Petitioner appears as amended at the hearing.
[2] The name of the Union/Petitioner appears as amended at the hearing.
[3] The name of the Intervenor appears as amended at the hearing.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding[4], the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. Xpedx ("Employer") is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.[5]

3. The labor organizations involved claim to represent certain employees of the Employer.[6]

4. No questions affecting commerce exist concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act for reasons discussed *infra*.

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[4] The Board's formal papers, introduced into evidence at the hearing, did not contain a copy of the RC petition filed in Case 22-RC-13066. I hereby take administrative notice of and include in the record as Board Exhibit 1(g), a copy of the RC petition filed by Local 560. The petition is an official Board document, of which I am entitled to take administrative notice in this proceeding. *See Operating Engineers Local 513 (Thomas Industrial Coatings),* 345 NLRB 990 fn. 2 (2005); *Bryant & Stratton Business Institute,* 321 NLRB 1007 fn. 2 (1996); *Gebhardt-Vogel Tanning Co.,* 154 NLRB 913, 915 (1965). Briefs filed in this matter, by the Employer and the Intervenor, have been duly considered.

[5] The Employer, a Division of International Paper Company, a New York corporation, is engaged in the warehousing and distribution of paper products, packing facility supplies, janitorial supplies and graphic arts supplies from its Clifton, New Jersey facility, its only facility involved herein. During the preceding 12 months, the Employer has purchased and received at its Clifton, New Jersey facility, goods and supplies valued in excess of $50,000 directly from suppliers located outside the State of New Jersey. By stipulation, the parties have eliminated Central Lewmar Co. as an Employer, as that entity ceased to exist as of December 31, 2009.

[6] The parties stipulated, and I find, that Local 560, International Brotherhood of Teamsters, ("Local 560") and Local 641, International Brotherhood of Teamsters, ("Local 641") are labor organizations within the meaning of Section 2(5) of the Act.

5. The following unit is appropriate for the purposes of collective bargaining within the meaning of 9(b) of the Act for reasons discussed *infra*:

All warehouse employees, including shipping and receiving employees, order pickers, packers, drivers and drivers' assistants employed by the Employer at its Clifton, New Jersey facility, excluding dispatchers, office clerical employees, sales employees, professional employees, guards, watchmen, porters, management trainees and supervisors as defined in the Act.

II. FACTS

The record reveals that the Employer is a New York corporation engaged in the warehousing and distribution of paper products, janitorial and packing products and graphic arts supplies at its Clifton, New Jersey facility ("Clifton") and until about November 2009, at facilities located in Newark, New Jersey ("Newark") and Elizabeth, New Jersey ("Elizabeth"). Almost all of the products stored and shipped out of the Newark warehouse were fine paper products. The Elizabeth warehouse handled the Employer's other products, as well as fine paper. The Employer also did shipping work for Federal Express ("FedEx") at its Elizabeth facility. The two warehouses were about three miles apart. Both the Newark and Elizabeth warehouses delivered the Employer's products to customers in the New York metropolitan area: New York, New Jersey and Connecticut.

In about September 2009, the Employer began transferring its staff, vehicles and equipment to Clifton. First, the office and sales employees were moved to the new facility, and then the Employer's FedEx operation was moved from Elizabeth to Clifton. Thereafter, the Employer ceased its warehouse operations at both the Newark

and Elizabeth facilities. By November 16, 2009, the Employer's entire operation had been consolidated into its Clifton, New Jersey facility.

Prior to the consolidation, Local 560 represented the drivers who worked out of Newark.[7] At the time of the merger, there were 11 drivers covered by the collective bargaining agreement between Local 560 and the Employer.[8] The 19 warehouse workers at Newark were represented by Local 641 at the time of the consolidation. At the Elizabeth facility, Local 641 represented a single unit of 11 drivers and 14 warehouse workers.[9] All of the drivers accepted transfer to Clifton. At the completion of the merger, there were 62 employees employed at the Clifton facility, 11 of whom (the former Newark drivers) had been represented by Local 560.[10]

The Employer's Group Human Resources Manager, Kathy McKenzie, testified that she had responsibility for the human resources issues at Newark and Elizabeth prior to the consolidation and that she is currently the Group Human Resources Manager for the Clifton facility. Kevin Whitfield, who was formerly the Warehouse Manager in Elizabeth, is now the Operations Manager at the larger Clifton facility.

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[7] The Newark warehouse was operated by Central Lewmar, LLC, a wholly owned subsidiary of International Paper. Employees of Central Lewmar received the same paychecks as employees from Xpedx; they were under the same Human Resources department and had the same employee handbook and policies as Xpedx employees. Central Lewmar was dissolved on about December 31, 2009.

[8] The agreement between Local 560 and the Employer is effective by its terms from April 1, 2005 to March 31, 2010.

[9] Those employees were covered by a collective bargaining agreement effective by its terms from January 16, 2008 to January 15, 2011.

[10] After the merger of the workforce at Clifton, the Employer applied the Local 641 collective bargaining agreement from Elizabeth to all the employees. The exception is for the drivers who were formerly represented by Local 560, who are subject to the terms and conditions of the Local 641 agreement but are receiving the wage rates and benefits of the Local 560 agreement. The Employer awaits the resolution of the instant matter to ascertain the wage rates and benefits to apply to those individuals. The Employer has asked that I take official notice of certain unfair labor practice charges and the withdrawal thereof. I decline to do so as the unfair labor practice charges are not relevant to this proceeding.

Jeffrey Tomaszewski, the Warehouse Manager in Clifton, had been the Warehouse Manager in Newark. He now reports to Whitfield. Frank Macho, a Warehouse Supervisor from Newark, is now the Transportation Supervisor at Clifton supervising all the drivers. Robert Stibitz, the Assistant Warehouse Manager from Elizabeth, and Javier Paucar, a Warehouse Supervisor from Newark, are now Warehouse Supervisors in Clifton.[11]

Whitfield testified that the warehouse workers from Newark and Elizabeth have the same duties at the Clifton facility as they had at their previous facilities. While the products the warehouse workers may store, pick, pack and load may have changed, (the Elizabeth facility warehoused janitorial and packing supplies as well as printing paper, while only fine paper products were warehoused in Newark) little has changed for the warehouse workers other than the product and the volume warehoused. The warehouse at Elizabeth was partially automated; one warehouse worker out of 20 operated the automated system. The automated system was not transferred to Clifton, as the system needed over $1 million in repairs. Operating the automated system was not a permanent assignment, but merely done by a warehouse worker for that shift. As the system did not follow the workers to Clifton, it is no longer necessary for the warehouse workers to possess the skills needed to operate it. The warehouse in Newark did not have an automated warehousing system, so the warehouse workers represented by Local 641 in Newark never operated the system.

[11] The parties stipulated that all of these individuals are 2(11) supervisors. At the hearing, the parties also stipulated that the position of dispatcher, currently held by employee Andrew Alba, should be excluded from the unit.

The duties of the drivers from both the Newark and Elizabeth facilities have not changed since the merger: they drive trucks to deliver the Employer's products to its New York metropolitan area customers. Thus, they take the Employer's products to customers where it is unloaded, either by a helper or the customers' employees, whereupon they go on to the next customer until the truck is empty. While Local 641 represented drivers from Elizabeth also helped the warehouse workers load their trucks, Local 560 represented drivers from Newark did not. All drivers now help load their trucks at Clifton when their truck is not already fully loaded prior to the start of their shift. The Employer also merged the truck fleets when the two facilities merged: as such, drivers from Elizabeth now drive trucks that were formerly in Newark and trucks from Elizabeth are being driven by the drivers from Newark. Routes formerly run out of the different facilities have been combined so the drivers from Elizabeth are now making deliveries to customers that were formerly made by drivers from Newark and vice versa. The seniority lists have been merged and drivers from the merged lists bid on those combined routes.

The Employer's warehouse operation operates 24 hours a day. Warehouse workers from both Newark and Elizabeth worked three shifts: 6 a.m. to 3 p.m., 3 p.m. to 10 p.m. and 10 p.m. to 6 a.m. There was also one shift devoted solely to FedEx. The warehouse shifts are the same at Clifton. The drivers start between 5 a.m. and 7 a.m. and work until whenever they return from their routes.

Upon consolidation, the Employer determined that it had more warehouse employees than it needed to run the warehouse. The Employer then offered the least senior warehouse workers from Elizabeth the opportunity to work as drivers' helpers

on the trucks. They assist drivers by unloading the Employer's products at its customers' locations. When they are serving as helpers those individuals are paid a reduced rate. However, they also work from time to time in the warehouse and are paid the standard warehouse employee rate when they do so.[12] There was one helper working in Newark. He retired prior to consolidation.

The drivers and warehouse workers interact each morning when the drivers assist in loading their vehicles. The warehouse workers use hand jacks and forklifts to load while the drivers only utilize hand jacks. Both the drivers and warehouse workers work hourly. They all punch a time clock. They all share a common break room. The Employer conducts monthly safety meetings for all employees. All of the employees are subject to the Employer's drug testing policy. The drivers are also subject to DOT drug testing regulations.

The Employer's FedEx operation, moved from Elizabeth to Clifton, is done by seven warehouse workers. That work has not changed since the consolidation.

III. THE PARTIES' POSITIONS

The Employer's position is that in November 2009 it relocated and merged its two former facilities, in Newark and Elizabeth, to a single facility in Clifton. It then recognized Local 641 because it had sufficient predominance to represent the combined workforce: at the conclusion of the relocation and merger the Employer had 62 employees of which 11 had been represented by Local 560 and 51 had been represented by Local 641. It contends that no question concerning representation

[12] Two warehouse employees from Elizabeth resigned rather than accept positions as helpers for reduced wages, which is $13 an hour for helpers and $16.81 an hour for warehouse employees.

exists and that the bargaining unit should be clarified, in accordance with the UC petition that it filed, to include a single unit of warehouse employees, drivers and helpers employed at its Clifton facility.

Local 560 contends that a question concerning representation exists and that the Board should find a unit of drivers and helpers appropriate. Therefore, it contends, an election should be held in a unit of drivers as stated in the RC petition that it has filed. Alternatively, Local 560 would agree to proceed to an election in an overall unit of drivers, helpers and warehouse employees if such a unit were found to be appropriate.

Local 641 takes the position is that its superior numbers provide a predominate majority under which the Employer must recognize it for a single unit of drivers, helpers and warehouse employees under the Board's consolidation and accretion precedents. Accordingly, Local 641 asserts that its current contract with the Employer is a bar to processing Local 560's petition.

IV. ANALYSIS

The Board has addressed issues of accretion and contract bar in situations where an Employer has merged its operations by, for example, transferring union represented employees from one facility where operations have ceased to another facility where similarly situated employees are represented by another union or unions under a different collective bargaining agreement or agreements. In such circumstances, the Board will find an accretion and contract bar where a relatively small, related operation is included or added to the coverage of a collective bargaining unit involving a larger group of employees. *Hudson Berlind Corp.*, 203 NLRB 421,

422 (1973), enforced, 494 F. 2d 1200 (2nd Cir. 1974); *Massachusetts Electric Co.*, 248 NLRB 155 (1980). In *Martin Marietta Co.*, 270 NLRB 821, 822 (1984), the Board stated:

> When an employer merges two groups of employees who have been historically represented by different unions, a question concerning representation arises, and the Board will not impose a union by applying its accretion policy where neither group of employees is sufficiently predominant to remove the question concerning overall representation. In these circumstances, a contract executed before the merger, covering one of the facilities being merged will not bar an election in the merged operations.

These matters are complicated further when, as in *Massachusetts Electric*, *supra*, merged bargaining units of equivalent size are not identical in scope. When such units are commingled, "statutory policies will not be effectuated if, through the application of ordinary principles of accretion, a bargaining agent is imposed on either unit of the newly integrated operation found appropriate." *Massachusetts Electric*, supra at 157. Turning to the raw numbers, in *Martin Marietta*, supra, the Board found that a question concerning representation was raised when one of the represented groups to be merged composed 63% of the merged workforce. In *National Carloading*, 167 NLRB 801 (1967), the Board found that 62.9% of the merged unit was not adequate to preclude a question concerning representation. See also, *Boston Gas Co.,* 221 NLRB 628, 629 (1975).

Several factors are considered in determining whether, following a transfer of operations, an accretion to a preexisting contractual unit has occurred so that the combined employee contingent constitutes an enlargement of the original contractual unit. These factors include whether there was any substantial change in operations

following the relocation or consolidation, whether the employees in the original unit comprised a majority of the newly combined workforce and whether the asserted accreted employees share a substantial community of interest with the employees employed in the contractual unit following the transfer or consolidation. *ABF Freight System, Inc.*, 325 NLRB 546, 559 (1998.)

The consolidation of the Employer's operations resulted in a relocation of the Newark and Elizabeth facilities to Clifton, accompanied by a transfer of the Newark and Elizabeth employees and vehicles with only a very minor change in the Employer's operations. Employees will warehouse the products for and deliver to the same customers and in the manner as before the merger. They are utilizing the same equipment and are supervised by the same supervisors. The only change in the Employer's operation is the loss of its automated warehousing system from Elizabeth, which was operated by only one warehouse employee.

Generally, where an employer merges two groups of employees that have historically been represented by different unions, the Board finds that the merger raises a question of representation unless one of the groups constitutes such a large proportion of the merged workforce that there is no reason to question the continued majority status of that group's bargaining representative. *Metropolitan Teletronics Corp.*, 279 NLRB 957, 960 (1986); *Martin Marietta Refractories Co*., 270 NLRB 821, 822 (1984); *Massachusetts Electric Co*., 248 NLRB 155, 157 (1980); *Boston Gas Co.*, 221 NLRB 628, 629 (1975).

Local 641's former employees represent a significant majority of the merged workforce: 83 percent. While the Board has not specifically delineated exactly how

large a majority of employees is needed following a merger to constitute clear predominance for one of the units, Board cases indicate that Local 641's complement clearly satisfies the standard. Thus in *Custom Deliveries, Inc.,* the Board suggested that at least 70 percent of the combined unit would preclude the existence of a question concerning representation. *Custom Deliveries, Inc.*, 315 NLRB 1018 (1994.) See, *Metropolitan Teletronics Corp.*, 279 NLRB 957, 960 (1986) (no reason to doubt union's continuing majority status where it represented 63 percent of combined workforce, while union from another facility represented 5 percent and the remaining 32 percent of the employees in a combined unit had been unrepresented). Cf., *Martin Marietta Refractories Co*., 270 NLRB 821, 822 (1984) (merger of two units represented by different unions created a question concerning representation where one union had represented about 63 percent and another had represented 36 percent of the employees).

The Board finds a valid accretion when the additional employees have little or no separate group identity and when they share an overwhelming community of interest with the preexisting unit to which they are accreted. *E.I. DuPont de Nemours*, 341 NLRB 607 (2004); *Ready Mix USA, Inc*., 340 NLRB 946, 954 (2003.) When determining if new employees have a community of interest with employees of an existing bargaining unit, the Board considers various factors including interchange and contact among employees, degree of functional integration, geographic proximity, similarity of working conditions, similarity of employees' skills and functions, supervision and collective bargaining history. *E.I. DuPont de Nemours*, 341 NLRB 607 (2004); *Archer Daniels Midland Co.*, 333 NLRB 673, 675 (2001).

Here, the uncontested evidence indicates that former Newark, Local 560 represented unit employees have been transferred to the Clifton facility and there joined with similarly situated represented employees where they perform identical work. It is also undisputed that Clifton employees in similar classifications perform similar functions.

I find that there is sufficient evidence of community of interest in an overall unit which would of necessity require disregarding the history of collective bargaining in separate units at the Newark facility. It is clear that the drivers from Newark and the drivers from Elizabeth share a community of interest. They perform the same work, drive and help load the same trucks, bid for the same routes and drive with the same helpers. They share the same supervision. They came from facilities only three miles apart and services customers in the same geographic area.

The Local 560 represented Newark drivers work with and share interest with the employees from Newark and Elizabeth who were represented by Local 641. To that end, they load their trucks alongside Local 641 represented warehouse workers, interacting with the warehouse employees on a daily basis, they are accompanied on their trucks by Local 641 represented warehouse workers who are now serving as helpers, they will drive routes just as the Local 641 represented drivers do and use the same trucks as those drivers. They are supervised by the same Transportation Supervisor, are dispatched by the same dispatcher and pull in and out of the same loading docks. They work the same shifts as the former Elizabeth drivers. The only minor change in the Employer's operation is the elimination of the automated warehousing system, which affected only a small number of employees.

All employees work hourly, punch the same time clock and are subject to the same corporate drug testing. They are subject to the same employee handbook. While drivers do not work in the warehouse and warehouse workers do not drive, helpers work both in the warehouse and on the trucks. In addition, warehouse employees from both Newark and Elizabeth and all employees other than the drivers from Newark enjoy the same benefits and their terms and conditions are governed by the same contracts. Thus, due to the evidence of common management, degree of contact between warehouse employees and drivers, I conclude that they share a community of interest such as would warrant inclusion in the same unit.

Local 560 argues that the Employer established a practice for merger of its facilities when it merged two facilities, not involved in the instant matter, and abided by the determination of the Teamsters' International union which directed that one local would represent one group of employees and another local would represent the other group. Neither I, nor the Employer is bound by the decision of the International, or the Employer's actions at another facility. Instead, I look to the appropriate Board precedents to make my determination.[13]

For the reasons discussed above, I find that a single unit of drivers, helpers and warehouse employees appropriate. I also find that the Local 641 Elizabeth collective bargaining agreement is a bar to an election in this unit. Within that unit, based on the evidence and Board authority referred to above, I find that Local 641 represents a predominant portion of the unit (83%). Therefore, based on the entire record in this

[13] I have therefore placed no reliance on Local 560's exhibits dealing with disputes at other facilities.

proceeding, I will clarify the existing Local 641 unit of drivers, helpers and warehouse employees to include the drivers previously represented by Local 560.

ORDER

IT IS HEREBY ORDERED that the petition filed in Case 22-RC-13066 herein be, and it hereby is, dismissed. **IT IS HEREBY ORDERED** that the petition for unit clarification in Case 22-UC-339 is granted.

V. RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570-0001. The Board in Washington must receive this request by **February 17, 2010.** The request may be filed electronically through E-Gov on the Agency's website, www.nlrb.gov, but may not be filed by facsimile.[14]

Signed at Newark, New Jersey this 3rd day of February, 2010.

/s/ J. Michael Lightner
J. Michael Lightner, Regional Director
National Labor Relations Board
Region 22
20 Washington Place, Fifth Floor
Newark, New Jersey 07102

[14] To file the request for review electronically, go to www.nlrb.gov and select the E-Gov tab. Then click on the E-Filing link on the menu and follow the detailed instructions. Guidance for E-filing is contained in the attachment supplied with the Regional Office's initial correspondence on this matter and is also located under "E-Gov" on the Agency's website, www.nlrb.gov.